Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1181

RICHARD A. BATTERTON, ETC., ET AL.,
Petitioners,

v.

ROBERT FRANCIS, ETC., ET AL.,
Respondents.

RICHARD A. BATTERTON, ETC., ET AL.,
Petitioners,

v.

BARRY BETHEA, ETC., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Petitioner, Richard A. Batterton, Secretary, Maryland Department of Human Resources (formerly Department of Employment and Social Services), prays that a writ of certiorari issue to review the per curiam opinion and judgment of the United States Court of

Appeals for the Fourth Circuit entered in these two proceedings on September 22, 1975.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the Fourth Circuit, not yet reported, appears in the Joint Appendix filed with the petition (A. 100a). The opinions of the United States District Court for the District of Maryland that resulted in the appeal to the Court of Appeals, were entered on June 25, 1974, in *Francis v. Batterton,* 379 F. Supp. 78 (hereafter *Francis-II)* (A. 79a) and November 27, 1974, in *Bethea v. Mason,* 384 F. Supp. 1274 (hereafter *Bethea)* (A. 86a). The appeal to the Court of Appeals was consolidated with the appeal in a companion case, entitled *Francis v. The Chamber of Commerce of the United States of America.* That appeal was decided by the Court of Appeals in the same per curiam opinion and a petition for certiorari is also being filed in that case, No.

This Court, by its order of November 20, 1975, upon application of counsel for the Petitioner herein, extended the time for filing a petition for writ of certiorari in this matter to and including February 19, 1976 (A. 104a).

JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1975. This petition for certiorari is being filed within the extended period permitted by the Order of this Court of November 20, 1975, hereinabove noted. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Does 45 C.F.R. 233.100(a)(1), as amended, violate the provisions of 42 U.S.C. 607(a), which authorizes the United States Department of Health, Education, and Welfare (HEW) to prescribe standards for the determination of unemployment in the AFDC-UF program.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The challenged Maryland regulation held invalid below, MARR 7.02.09 Sec. 10.A(2) (formerly Rule 200X.A.2), provides as follows:

> A grant may not be paid from GPA-E or AFDC-E:
>
> * * * * * *
>
> 2. To meet need due to being disqualified for unemployment insurance.

The HEW regulation, 45 C.F.R. 233.100(a)(1), also held invalid below, provides in pertinent part:

> If a State wishes to provide AFDC for children of unemployed fathers, the State plan under Title IV — Part A of the Social Security Act must . . . [exceptions not relevant here]:
>
> (1) Include a definition of a unemployed father . . . . Such definition must include any father who:
>
> (i) Is employed less than 100 hours a month; or
>
> (ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hour standard for the prior 2 months and is expected to be under the standard during the next month; except that, at the option of the State, such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law.[1]

Prior to July 12, 1973, when the said regulation was amended as above, it provided in part as follows:

> If a State wishes to provide AFDC for children of unemployed fathers, the State plan . . . must [with exceptions not here relevant] . . .:
>
> (1) Include a definition of an unemployed father . . . who:
>
> (i) Is employed less than 100 hours a month; or
>
> (ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hour standard for the 2 prior months and is expected to be under the standard during the next month.

The above State and Federal regulations were held invalid under Sec. 407(a) of the Social Security Act, 42 U.S.C. 607(a), which provides:

> The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a)(2) of this title, who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in Section 606(a)(1) of this title in a place of residence

[1] The full text of this regulation is contained in the Joint Appendix filed herewith (A. 124a).

maintained by one or more of such relatives as his (or their) own home.[2]

STATEMENT OF THE CASE

A. Francis v. Batterton

In this case, petitioner (hereafter "Maryland") is contesting the denial of a motion to vacate an injunction entered on March 6, 1972, requiring the State to pay AFDC-UF (also known as AFDC-E) benefits to the two classes represented by the plaintiffs, i.e. those disqualified from unemployment insurance because they were engaged in a labor dispute, and those disqualified because they were discharged for misconduct.

The case has had a long and involved course in the District Court, the Supreme Court and the Court of Appeals prior to this petition which illustrates the significance of the issues involved and a need for their final resolution at this time. The original complaint was filed on August 9, 1971. In it, plaintiffs requested that a Maryland social service regulation, Rule 200X.A.2 (now MARR 7.02.09 Sec. 10.A.(2)), be declared illegal and be permanently enjoined. Plaintiffs also requested the convening of a three-judge District Court and certification as a class action on behalf of all other persons similarly situated. Also, the complaint contended that the Maryland regulation violated the Equal Protection Clause, Section 407 of the Social Security Act, 42 U.S.C. 607, and the HEW regulation promulgated thereunder, 45 C.F.R. 233.100(a).

After the convening of a three-judge panel, the District Court issued an extensive opinion ruling on cross-motions for summary judgment, 340 F. Supp. 351

[2] The full text of 42 U.S.C. 607 is reprinted in the Joint Appendix at A. 34a.

(1972) (hereafter *Francis-I*) (A. 1a). In this opinion, the District Court specifically rejected the constitutional claim under *Dandridge v. Williams*, 397 U.S. 471 (1970). The court, however, did hold that as to the plaintiffs' and their represented classes, the Maryland regulation violated the federal *regulation* promulgated under the Social Security Act. Thereafter, on March 6, 1972, the Court enjoined the Maryland regulation as violative of the federal regulation (A. 54a). Maryland appealed that injunction to this Court. In an *amicus curiae* memorandum the Solicitor General of the United States urged this Court to summarily affirm the lower court ruling on the ground that the federal regulation was ambiguous and that the Secretary of HEW intended to amend it in order to clarify its meaning (A. 56a). Noting the effect of the proposed revision of the HEW regulation on the Maryland regulation, the Solicitor General stated:

> We are informed that under the proposed revision the regulation will expressly permit the States to vary, within limits, the coverage of their programs on the basis of factors other than the number of hours worked. This revision should remove any doubt concerning the validity of Maryland's Rule 200.X.A.2. *Such a regulation is clearly within the authority granted by the basic statute.* (A. 60a) (emphasis supplied)

Following the submission of the Solicitor General's memorandum, this Court summarily affirmed the decision below, 409 U.S. 904 (1972) (A. 61a).

On July 12, 1973, HEW did amend the pertinent federal regulation in the manner indicated, (A. 124a) and it is undisputed that that amendment clearly permits state regulations such as Maryland's regulation MARR 7.02.09 Sec. 10.A.(2). Accordingly, Maryland then moved the three-judge court to dissolve its injunction against the operation of the Maryland

regulation. In an informal letter opinion, the three-judge court announced its intention to grant Maryland's motion to dissolve the injunction (A. 61a1). However, the plaintiffs moved for reconsideration of this informal opinion, and the District Court granted such request and set the issue for hearing and briefs. On June 25, 1974, the District Court entered its decision denying Maryland's motion to dissolve the injunction, *Francis v. Batterton,* 379 F. Supp. 78 (*Francis-II*). (A. 79a). On July 25, 1974, Maryland filed notices of appeal of that decision in this Court and the Court of Appeals. The appeal to the Court of Appeals was designed to protect Maryland's appeal rights if this Court dismissed the appeal for want of jurisdiction. On December 9, 1974, this Court did dismiss the appeal on that basis and denied certiorari, treating the papers as a petition for a writ of certiorari before judgment, 419 U.S. 1042 (A. 99a). Maryland then pursued its appeal filed in the Court of Appeals. Maryland now is seeking review of the decision of the Court of Appeals on that appeal.

B. Bethea v. Batterton

The *Bethea* case involves an action in which individuals denied public assistance under Maryland's AFDC-UF program (that class of individuals unemployed as a result of being "voluntary quits") also challenged the constitutional, statutory and regulatory validity of the same Maryland regulation challenged in the *Francis* case. Following the filing of Maryland's Motion to Dismiss and the plaintiffs' Motion for Summary Judgment, the District Court entered an opinion dated November 27, 1974, which dismissed the State's motion and granted the plaintiffs' summary judgment (A. 86a). The opinion expressly approved the rationale of *Francis-II* and held that it also applied to the subject class (A. 96a). As a result, in a Judgment of

December 12, 1974, the District Court directed the State to pay benefits under Section 407 to all persons in the complaining class ". . . who would be eligible for these benefits but for the fact that they are ineligible to receive unemployment compensation due to having voluntarily quit their prior employment" (A. 98a). Maryland thereafter filed its Appeal of this order to the Court of Appeals, which was consolidated with that in *Francis-II.*

On September 22, 1975, the Court of Appeals, in its per curiam opinion affirmed the decisions in *Francis-II* and *Bethea* for the reasons stated by the District Court in both cases, and it adopted the opinions of the District Court as its own (A. 100a). In summary, the Court of Appeals held that the amended HEW regulation was invalid and that under the Social Security Act Maryland could not exclude from the benefits of AFDC-UF a child whose father is unemployed as a result of participation in a strike, misconduct, or voluntarily leaving his employment.

REASONS FOR GRANTING THE WRIT

I.

The reasoning in the decisions below holding the latest HEW regulation invalid denies HEW any discretion under the statute to prescribe standards for the determination of unemployment.

In the *Francis-I* decision, which was affirmed by this Court, the District Court recognized the broad discretion granted HEW under the Social Security Act to prescribe standards for the determination of "unemployment" and to grant some discretion to the States with regard to those standards. In the section of its opinion discussing the misconduct disqualification, the court emphasized the great weight to be given to the

federal agency's interpretation ". . . particularly when the Congress has delegated policy making to the Agency." 340 F. Supp., at 365 (A. 24a). When addressing the issue of the disqualification of persons involved in labor disputes, *i.e.*, strikers, the court noted:

> . . . when Congress removed the parenthetical words "as defined by the State," and substituted the words "as determined in accordance with standards prescribed by the Secretary," Congress did not simply substitute the words "as determined by the Secretary." Thus, Congress used words which did not mandatorily require the Secretary to require each state to adopt the same meaning of the word "employment" but instead merely *authorized* the Secretary to prescribe a national meaning if the Secretary so desired. In so doing, this Court agrees that the Congress empowered the Secretary, by regulation, to require each participating state (1) to include or (2) to exclude from its respective AFDC-E program those out of work because of involvement in labor disputes, or (3) to leave that decision to each state. (emphasis in original) 340 F. Supp., at 367 (A. 26a).

Finally, the District Court expressly suggested to HEW that it could validate the Maryland regulation with regard to such persons by modifying its regulation:

> The said obligations of the State of Maryland hereunder with regard to the labor involvement issue will of course be different if, forthwith after the filing of this opinion, the Secretary of HEW amends 45 C.F.R. § 233.100(a) in accordance with the discretionary authority conferred upon him by, and within the confines of, 42 U.S.C. § 607 as construed in this opinion. 340 F. Supp., at 368, n.29a. (A. 29a).

Thus, *Francis-I* emphasized HEW's discretion to prescribe standards under the statute, in addition to the hourly test already embodied in 45 C.F.R. 233.100(a)(1).

Contrary to the views expressed in its first decision, the District Court, and Court of Appeals have now concluded that under the discretion granted by the statute, HEW cannot grant any discretion to the States with regard to persons disqualified for misconduct, and any discretion as to strikers must be severly circumscribed although the nature of these additional standards is not spelled out. With regard to persons disqualified for misconduct, the lower courts now have adopted the view that "unemployment" means "unemployment" regardless of the statutory authority granted HEW for prescribing standards for the determination of that status question. In other words, the courts have adopted a literal or "plain meaning" test for certain of the statutory words. It is true that this is an established canon of statutory construction, but also that it is somewhat discredited, *e.g. United States v. Compas-Serrano,* 404 U.S. 293 (1971); *Lynch v. Overholser,* 369 U.S. 705 (1962); *Harrison v. Northern Trust Co.,* 317 U.S. 476 (1943); 2A Sutherland, *Statutory Construction,* Sec. 47.07 (4th ed., 1973). Such approach totally ignores, of course, the literal meaning of the words following the word "unemployment" namely those granting HEW the authority to prescribe standards for the determination of that status.

Even in *Francis-II* the District Court seems to recognize that HEW does have some discretion with regard to strikers. The court refers to alternative "(3)" in the language of the earlier opinion quoted above, indicating that HEW could have left this eligibility policy question to the states, and states that phrase should have included the additional words "in accordance with appropriate standards established by the Secretary." (A. 84a). After quoting selective legislative history the court then suggests that some sort of national standards, although not a national definition,

are required in this area, without specifying what the standards are to be. It is difficult to imagine what standards HEW could adopt in this area, other than requirements that all States pay strikers or not pay them.

II.

The decisions below run counter to this Court's efforts to delimit areas of State policy-making authority in the administration of the public assistance programs created by the Social Security Act.

The lower courts reasoning not only errs from the analysis in *Francis-I,* but ignores the rule for interpreting the Social Security Act recently asserted by this Court in another welfare case:

> In interpreting this statute, we must be mindful that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . ." (citations omitted) *New York State Department of Social Services v. Dublino,* 413 U.S. 405, at 421 (1973).

During the course of its consideration of Maryland's motion to dissolve the previously issued injunction, the District Court requested and received the views of HEW on the validity of its new regulation in light of plaintiffs' contentions. That HEW amicus brief is included in the Appendix, (A. 61a2) and makes clear beyond peradventure that although the interpretation of the statute in *Francis-II* is *permissible,* neither the words of the statute nor the legislative history compel such a literal construction of the word "unemployment" as to persons disqualified for misconduct or the uniform, national definition as to the inclusion or exclusion of strikers required by the opinion.

In addition to their impact on the AFDC-UF program, the decisions below could result in future holdings involving other Federal-State welfare programs created under the Social Security Act contrary to the rule announced in *New York State Department of Social Services v. Dublino, supra.* Prior to the *Dublino* decision, certain decisions of this Court seemed to suggest that the States could not impose additional eligibility conditions in their regular AFDC programs in the absence of an express congressional authorization for such conditions indicated in the Social Security Act or its legislative history, *Townsend v. Swank,* 404 U.S. 282, 286 (1971); *Carleson v. Remillard,* 406 U.S. 598, 600 (1972); *King v. Smith,* 392 U.S. 309 (1968). The *Dublino* decision, however, made clear that there was room for additional State eligibility conditions in situations where the language of the Act did not expressly make the persons eligible. In discussing the earlier cases and the extent of State discretion, this Court stated:

> In those cases it was clear that state law excluded people from AFDC benefits whom the Social Security Act expressly provided would be eligible. The Court found no room either in the Act's language or legislative history to warrant the States' additional eligibility requirements. Here, by contrast, the Act allows for complementary state work incentive programs and procedures incident thereto — even if they become conditions for continued assistance. Such programs and procedures are not necessarily invalid, any more than other supplementary regulations promulgated within the legitimate sphere of state administration. (citations omitted) 405 U.S. 413, at 423.

III.

By substituting their own interpretation of the statutory words and intent for that of HEW, the lower courts have usurped the "legislative" rule-making authority expressly granted to HEW by the statute.

In substituting their own interpretation of the statute for that of HEW, the lower courts also violate established principles of administrative law, *e.g. Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945). *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965). Furthermore this interpretation supplanted a "legislative" rule which the Congress had expressly directed the agency to develop for the implementation of the statute, rather than an interpretative rule, adding an administrative gloss to a statutory term. See Davis, *Administrative Law Treatise*, Secs. 5.03 and 5.04, and cases cited therein (1958 and 1970 Supplement). A legislative regulation has the effect of law and is binding upon a court unless it is in excess of the granted power, issued pursuant to improper procedures, or unreasonable, *ibid, e.g. FCC v. Schreiber*, 381 U.S. 279 (1965).

The legislative history of the statutory provisions attached to and discussed in *Francis-I* shows strong congressional concern that AFDC-UF payments not go to persons who are "voluntarily" unemployed. The materials also show an intent that HEW develop national standards for determining unemployment, particularly as to hours worked, but not a mandatory, uniform federal definition of "unemployment" addressing all possible eligibility questions. The *Francis-II* decision not only violates established principles for construing legislative rules, but also raises questions as to any rules in which some discretion, however limited, has been granted to the States or other governmental

units or organizations participating in the administration of the program involved.

IV.

The Court should review the decisions below because of their major impact on the administration of the AFDC-UF program and the great public interest in the issues involved.

The net effect of the decisions below is to require AFDC-UF payments to all persons who come within the literal meaning of the statute, whether fired for misconduct, or on strike, and to deny HEW and/or the States any meaningful discretion as to the development of eligibility requirements, despite the grant of authority to HEW in the statute and the legislative history which indicated a reluctance to pay such benefits to persons "voluntarily unemployed". This holding will obviously have a substantial impact on the administration of AFDC-UF nationally. HEW advised the District Court that of a total of 23 States which operate the AFDC-UF program, at least 5 States, in addition to Maryland, impose eligibility conditions with regard to strikers, *Francis-I*, 340 F. Supp. at 363, n.22 (A. 19a).

The lower Courts' decisions now invalidate the new HEW regulation designed to make the legality of those conditions clear. That regulation was adopted by HEW, as a result of, and presumably in accord with, the *Francis-I* decision, and after the careful consideration of thousands of comments from interested persons and organizations, 38 Fed. Reg. 49 (January 3, 1973) and 18549 (July 12, 1973). Unless the holding of the *Francis-II* decision is reversed, it seems unlikely that HEW can develop any meaningful standards under the statute.

Despite its previous failures, HEW has again begun the difficult task of developing a regulation which will pass judicial scrutiny. On August 8, 1975, one month after argument of these cases before the Court of Appeals, HEW published new, proposed amendments to 233.100(a)(1) designed to meet the objections to the present regulation set forth in *Francis-II*, 40 Fed. Reg. 33461 (A. 121a). This latest proposal would only prohibit benefits to fathers whose unemployment results from involvement in a labor dispute when such involvement disqualifies or would disqualify them from unemployment insurance. As a result of this single disqualification, this new revision presumably would mandate AFDC-UF payments to the remaining classes involved in these proceedings, "misconducts" and "voluntary quits". Thus, this proposed amendment would substantially amend the operation of AFDC-UF in the great majority of States which now do not prohibit AFDC-UF payments to strikers. Although the period for comments on the proposal expired on September 8, 1975, no further action has been taken by HEW, and the status of the proposal is unknown.

If the proposal is adopted, it is quite likely that the sub-class of strikers involved in these proceedings would continue to press their claim for AFDC-UF benefits. For that reason, the adoption of the regulation would by no means settle or end the dispute, but only add another chapter to this four-year litigation. Therefore, the issue of the proper scope of HEW's authority, and that of the states, under Section 407(a) of the Social Security Act should be reviewed and resolved by this Court now.

The question as to the eligibility of strikers for payments has come to this Court before without any

final resolution of that question, *ITT Lamp Div. v. Minter*, 318 F. Supp. 364 (D. Mass., 1969), aff'd., 435 F.2d 989 (1st Cir., 1970), cert. denied, 402 U.S. 933 (1971); *Super-Tire Engineering Co. v. McCorkle*, 469 F.2d 911 (3rd Cir. 1972), rev'd and remanded, 414 U.S. 1107 (1974). With the involvement of the Chamber of Commerce as a party, it would appear that this case might be an appropriate one for resolving this separate issue. A reversal of the decisions below and an affirmance of the validity of the present HEW regulation would make clear the right of States to pay or not pay AFDC-UF to families of strikers as each State determined appropriate.

CONCLUSION

By its affirmance of *Francis-I,* this Court sought to encourage an administrative solution of the issues raised in this litigation by means of a new regulation proposed by HEW. Despite the adoption of that regulation, the lower courts have refused to vacate the previous injunction, even though the stated bases for that injunction have been removed. For the reasons indicated the decisions of the courts below now raise substantial questions of public importance concerning Federal and State administrative authority over welfare and other governmental programs. Therefore, this Court should grant plenary review of the decision below. Also, because of the holding below that the new HEW regulation is invalid the Court should request the views of the Solicitor General on the issues raised in this proceeding.

Respectfully submitted,

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